IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4288 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Petitioner(s)
Versus
KIRITBHAI SOMABHAI BARIYA C/O.INDIAN EMPLOYEES UNION - Respondent(s)

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Appearance :
Ms. Archana Raval, AGP for Petitioner.
MRS YOGINI V PARIKH for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 08/03/2006

ORAL JUDGMENT

Heard learned AGP Ms. Archana Raval for petitioner and Ms. Yogini Parikh, learned advocate for respondent workman. In this petition under Article 227

of Constitution of India, petitioner has challenged award made by labour court, Baroda in Reference No. 461 of 1990 dated 28th October, 2005, wherein labour court has partly allowed reference. Labour court has set aside the termination order and granted reinstatement with continuity of service with 50 per cent back wages for intervening period. Labour court also awarded cost of Rs.1000.00.

2. Learned AGP Ms. Raval submitted that the agricultural department is not an industry within the meaning of section 2(j) of the ID Act, 1947. She also pointed out about the conditions of service of the respondent workman. She also raised contention that the respondent was appointed as part time employee and he was being paid from the contingent fund. She also contended that the burden was upon the respondent to prove as to whether the department is covered by the definition of industry or not. She also submits that the Government Resolution dated 17th October, 1988 is not applicable to the workman. She also contended that it is initial burden upon the workman to prove that he has completed 240 days continuous service in preceding 12 months from the date of termination and since that burden was not discharged by respondent, labour court has committed

gross error in granting benefit in favour of respondent workman. Paragraph 11 of the impugned award at page 19 was read by her before this court and it was submitted that labour court has to examine whether the workman has completed 240 days continuous service within twelve months preceding the date of termination or not. According to her submission, this aspect was not examined by labour court and, therefore, labour court has committed gross error in passing such an award. In support of her submission that it is the burden upon the workman to prove that the department is an industry, she has placed reliance on the decision of apex court in STATE OF GUJARAT AND OTHERS VERSUS PRATAMSINGH NARSINH PARMAR [(2001) 9 SCC 713]. In support of her submission that it is the burden upon the workman to prove that he has completed 240 days continuous service within twelve months preceding the date of termination, she has placed reliance upon the apex court decision in RANGE FOREST OFFICER VERSUS ST HADIMANI reported in [(2002) 3 SCC 25] wherein it is observed by apex court that it is for workman to lead evidence to the effect that he had completed 240 days in the year preceding the date of termination of his service. Except the submissions recorded hereinabove and the decisions referred to

hereinabove, no further submission was made by her before this Court and no other decision was cited by her before this Court.

3. On the other hand, Ms. Yogini Parikh, learned advocate appearing for respondent on caveat, while supporting the impugned award, submitted that mere contention raised in written statement is not enough but that is required to be proved by the department. She also pointed out that no order was produced by the department to show that the respondent was appointed as a part time employee. She submits that when the department comes with a positive assertion that the respondent was appointed as part time employee and not as a full time employee, then, that part of their assertion is required to be proved by the department by producing some evidence to that effect. So, there was no positive order produced by department against workman on record and in absence of that, labour court was right in considering that the workman was not a part time employee. She also submits that the respondent workman was examined before labour court vide Exh.11 and workman deposed at Exh.11 before the labour court about his duties which were performed by him in the department. She also submits that once

evidence of workman was recorded before labour court, then, such oral evidence is required to be rebutted by petitioner by cross examining workman and also by examining its own witness but in this case, it has not been done by petitioner before labour court. According to her submission, oral evidence of workman was not rebutted by petitioner to prove that the department is not an industry within the meaning of section 2(j) of the ID Act, 1947. She also submitted that on the basis of evidence vide Exh.45 and documentary evidence produced by petitioner, labour court has come to the conclusion that the workman had completed 240 days continuous service within twelve months preceding the date of termination and, therefore, labour court was right in considering evidence on record and in doing so, labour court has not committed any error, therefore, there is no substance in this petition and same is required to be dismissed.

4. I have considered submissions made by learned advocates for parties. I have also perused award made by labour court. I have also considered statement of claim filed by workman and written statement filed by petitioner. Except that, no other documents have been produced by petitioner before this Court.

5. In respect of contention raised by learned AGP Ms. Raval that the petitioner is not an industry within the meaning of section 2(j) of the ID Act, 1947, respondent workman was examined before labour court vide Exh.11 wherein he deposed in clear terms that he joined service on 10.6.1987 as rojamdar peon, iniially, his salary was Rs.450.00 which was subsequently reduced to Rs.375.00, he was discharged by the establishment on 29.1.1990. He was doing the work of serving water in office and to place files from one table to another table and he was being paid on voucher. It was denied by him that he may be engaged in the season of agriculture and otherwise, being discharged. It was also denied that he was being paid as rojamdar part time. Thus, in his cross examination, nothing to the contrary has come out and by leading oral evidence, it was proved by workman that he was working with the department on the post of peon. As regards contention of learned AGP Ms. Raval that it is the burden on employee that the department is an industry and unless it is discharged by workman, it is not necessary for department to prove that it is not an industry, she has relied upon the decision of apex court in case of STATE OF GUJARAT AND OTHERS VERSUS PRATAMSINGH

NARSINH PARMAR [(2001) 9 SCC 713]. I have gone through said decision of apex court. In paragraph 5 of said decision, it is observed by the apex court that;

"if a dispute arises as to whether a particular establishment or part of it wherein an appointment has been made is an industry or not,it would be for the person concerned who claims the same to be an industry to give positive facts for coming to the conclusion that it constitutes an industry. Ordinarily, a department of the Government cannot be held to be an industry and rather it is a part of the sovereign function. To ind out whether the respondent in the writ petition had made any assertion that with regard to the duty which he was discharging and with regard to the activities of the organization where he had been recruited, we find that there has not been an iota of assertion to that effect though, no doubt, it has been contended that the order of dismissal is vitiated for non compliance with section 25F of the Act. The State in its counter affidavit, on the other hand, refuted assertion of the respondent in the writ petition and took the positive stand that the Forest Department cannot be held to be an industry so that the provisions of Section 25F cannot have any application.

In the absence of any assertion by the petitioner in the writ petition including the nature of duty discharged by the petitioner as well as the job of the establishment where he had been recruited, the High Court wholly erred in law in applying the principles enunciated in the judgment of this Court in Jagannath Maruti Kondhare”

Observations made by apex court in aforesaid decision have to be taken into account in light of the facts of this case. As per the facts of this case, in paragraph 1 of the written statement filed by petitioner, it is contended by petitioner that the provisions of ID Act and other labour legislations are not applicable to petitioner and in paragraphs 3 and 5, petitioner has contended that the respondent was engaged as part time rojamdar, therefore, ID Act is not applicable to it. There is no positive evidence led by petitioner before labour court to prove that the petitioner is performing sovereign function of the Stat e. Function of workman was clear that he was discharging duties as a peon and was shifting file from one table to another and was serving water to concerned employees. No contention was raised by petitioner before labour court to decide whether the department is an industry or not. No argument has been

made by petitioner before labour court that the department is not an industry. Mere contention was raised by petitioner in its written statement that it is not an industry but it has not been substantiated by petitioner by leading proper evidence. One witness Chorel Kalubhai was examined by petitioner at Exh.45 before labour court. He has also not narrated any facts that the department is performing sovereign function and it is not an industry within the meaning of section 2(j) of the ID Act, 1947. Merely because the provisions of the BCSRs are applicable, it will not outset the department from the definition of industry. According to my opinion, therefore, in the peculiar facts of this case, decision of apex court in STATE OF GUJARAT AND OTHERS VERSUS PRATAMSINGH NARSINH PARMAR [(2001) 9 SCC 713] is not applicable to this case and is not helpful to petitioner.

I have also considered decision in case of RANGE FOREST OFFICER VERSUS ST HADIMANI reported in [(2002) 3 SCC 25] cited by Ms. Raval in support of her submission that it is the burden upon the workman to prove that he has completed 240 days continuous service within twelve months preceding the date of termination. Recently, this decision in case of HADIMANI (supra) given by Division

Bench of apex court has been considered by Three Judges Bench of the apex court in case of R.M. YELLATTI V. ASSISTANT EXECUTIVE ENGINEER reported in AIR 2006 SC 355, on 7th November, 2005. In RM Yellatti (supra) before the apex court, non compliance with section 25F was allegedby workman who was daily wager claiming to have worked for 240 days in given year and called upon management to produce muster roll borne out by certificate issued by former Assistant Executive Engineer. Defence raised by management was that the workman had not worked as daily wager on all days during that period. There was no explanation from the side of management as to why for remaining period,Nominal Muster Rolls were not produced. Therefore, it was held by apex court that the case of workman that he had worked for 240 days in a given year stands supported by certificate and termination without complying with section 25F constituted illegal retrenchment. In said decision, ultimately, apex court set aside order of termination and granted 50% back wages for intervening period. Relevant observations made by apex court in paragraph 19 are reproduced as under:

“19. Before concluding, we would like to make an observation with regard to ca ses concerning retrenchment/termination of services of daily waged

earners, particulars of those who are appointed to work in Government departments.Daily waged earners are not regular employees. They are not given letters of appointment. They are not given letters of termination. They are not given any written documents which they could produce as proof of receipt of wages. Their muster rolls are maintained in loose sheets. Even in cases where registers are maintained by Government departments, the officers/clerks making entries do not put their signatures. Even where signatures of clerks appear, the entries are not countersigned or certified by the appointing authorities. In such cases, we are of the view that the State Governments should take steps to maintain proper records of the services rendered by the daily wagers; that these records should be signed by the competent designated officers and that at the time of termination, the concerned designated officers should give certificates of the number of days which the labourer/daily wager has worked. This system will obviate litigations and pecuniary liability for the Government."

Aforesaid are the observations made by apex court in light of cases where the Government departments are not cooperating and are not producing correct record

before the labour court.

In view of the factual aspects of this case, there is no evidence on record produced by petitioner that the workman was appointed as part time employee. The matter would have been different if it was a case of total denial by petitioner that the workman is working as daily wager but instead of denying the claim of workman as a whole, petitioner contended before the labour court that the workman was engaged with effect from 10.6.1987, at one stage, witness for petitioner admitted this aspect at Exh.45 that the workman continuously worked from 10.6.87 to 29.1.1990 and in the next breath, stated that he was performing on piecemeal basis. Therefore, labour court recorded such categorical finding in page 18. When witness of petitioner admitted before labour court that the petitioner has not produced any documentary evidence to establish that the workman was appointed as part time. No evidence was produced to establish that the workman was working as part time employee. Workman had completed 240 days continuous service according to the witness of petitioner at Exh.45 and documentary evidence produced by petitioner vide Exh. 47. Petitioner not produced muster roll and voucher of payment to workman. This evidence of

witness of petitioner at Exh. 45 and documents produced vide Exh. 47 muster roll and voucher of payment made to workman for period from 10th June, 1987 to 29th January, 1990 are sufficient enough to establish that workman was remaining in continuous service and has completed 240 days continuous service in 12 months preceding date of termination of service. These facts have been established before labour court and labour court is right in coming to the conclusion that the workman had completed 240 days continuous service as proved from record of petitioner itself. It is not the case of petitioner that it has ever complied with section 25F of ID Act, 1947 and it is not in dispute between the parties that the petitioner has not complied with sec. 25F of ID Act, 1947. What is being impliedly submitted by petitioner is that since it is not an industry and since respondent was employed as a part time employee, provisions of the ID Act are not applicable and, therefore, petitioner is not obliged to comply with S.25F of the ID Act before retrenching respondent workman. Non compliance of mandatory provisions of S.25F of the ID Act, 1947 has rendered terminatin of workman void, ab initio. Labour court has also considered that the work which was being performed by workman is still continuing as per the statement of

witness for petitioner at Exh.45. Labour court also considered that fresh recruitments were made as daily wager and junior daily wagers were also retained in service. In para 13 of the impugned award, labour court observed that according to the evidence of witness for petitioner, workman was in service from 10.6.1987 to 29th January, 1990 from the admission made by the witness for petitioner. No document was produced by petitioenr in support of its positive plea that the respondent was engaged as a part time daily wager and not as a full time daily wager. Ultimately, labour court recorded finding that the termination of respondent amounts to retrenchment and is illegal and void ab initio for want of compliance of S.25F of ID Act, 1947. Then, the labour court examined the question of back wages. As regards back wages, workman in his examination in chief, it was deposed by workman that he is unemployed and could not secure job inspite of attempts made by him. In his cross examination, it was deposed by him that his family consists of himself, two issues, wife, brother and son of his brothers, thus, total eight members; his brother is serving and is SSC pass. Such things have come out in the cross examination of workman. Thus, it has not come out from his cross examination that he was gainfully employed

and was earning during the intervening period. Further, the petitioner has also not produced any evidence to show that after the concerned workman was discharged, he was employed gainfully elsewhere and was earning from such employment. Considering this deposition of workman that concerned workman has passed SSC Examination and is aged about 35 years and also considering the fact that the year of reference is 1990, labour court granted 50% of the back wages for intervening period from the date of termination till the date of award. For granting such back wages for intervening period, labour court considered family back ground of respondent workman. Legally, burden is upon the employer to prove gainful employment of workman. In this case, petitioner has not proved gainful employment of respondent. Labour court considered pendency of reference from 1990 to 2005 and considering all these aspects of the matter as a whole, though gainful employment of respondent was not established, labour court refrained it from granting full back wages and granted only 50%. Petitioner is a State. It has to pay such back wages from amounts of public exchequer. Labour court, therefore, rightly considered that public body should not have to be saddled with liability of full back wages. This balancing aspect of

labour court is just and proper because in similar circumstances, apex court, in case of Management of MCD versus Prem Chand Gupta reported in AIR 2000 SC 454, considered that in case of violation of section 25F of ID Act, 1947, logical consequence would be that the workman would be entitled to be reinstated in service with continuity and normally would be entitled to full back wages but in said reported decision, apex court granted only 50 % back wages for intervening period. Para 18 and 19 of said decision being relevant and material in light of the facts of this case, are reproduced as under:

“We have now reached the stage for considering appropriate relief to be granted in the light of our findings on Point No. 2. Once it is held that termination of respondent workman on 29.4.1966 was null and void being violative of of Section 25F of the ID Act, the logical consequence would be that he would be entitled to be reinstated in service with continuity and in normal course, would be entitled to full back wages.However, in our view, on the peculiar facts of this case, it will not be appropriate to grant full back wages to the respondent workman even though he will be entitled to be reinstated in service of the appellant Corporation with continuity and all further consequential benefits on that score,

save and except the grant of full back wages, as indicated herein below.

19. The reasons for non granting full back wages from the date of his termination of 29.4.1966 till actual reinstatement pursuant to the present order can now be indicated. Firstly, for no fault of the contesting parties, the litigation has lingered on for more than three decades.The termination order was as early as on 29.4.1966 and after 33 years and more it is being set aside. To saddle the appellante corporation and its exchequer, which is meant for public benefit, with full back wages for entire period would be too harsh to the appellante corporation. It is the delay in disposal of cases in the courts that has created this unfortunate situation for both the sides. Respondent workman is also not at fault as he was clamouring for justice for all these years. However, this delay in court proceedings for no fault of either side permits us not to burden the appellant Corporation, being a public body, with the full back wages for the entire period of respondent workman's unemployment, especially when for no fault of either side actual work could not be taken from the respondent workman by the appellant corporation.It is true that the respondent workman was always willing to work but he

could not be permitted to work so long as the termination order stood against him. The Labour Court as well as the learned single Judge upheld that order. Only the Division Bench set aside that order. This Court at SLP stage itself while granting leave stayed reinstatement order on 17.11.1997.Two more years since elapsed during the pendency of this appeal before this Court. All these factors together with point in the directin of not saddling the appellant corporation, a public body, with the burden of entire full back wages to be granted to the respondent workman after the passage of 33 years since his order of termination.The second reason is that the respondent workman for all these years could not have remained totally unemployed though there is no clear evidence that he wsa gainfully employed and was so well off that he should be denied complete back wages. But keeping in view the fact that for all these long years fortunately the respondent workman had survived and has still two more years to reach the age of superannuation as we are told, not granting him full back wages on the peculiar facts of this case, would meet the ends of justice. We, therefore, following order:

1. The impugned order of the Division Bench the High Court insofar as it holds that the termination order

of the respondent workman dated 29.4.1966 was violative of Rule 5 of the relevant Rules is set aside.

2. However, te final order passed by the High Court ordering reinstatement of the respondent workman with continuity of service is upheld on the alternative ground holding termination of services of the respondent workman on 29.4.1966 to be violative of S ec.25F of the ID Act.

3. So far as back w ag es are concerned, the impugned order of the High Court is modified by directing that the respondent workman will be entitled to get 50 per cent of back wages from the date of his termination i.e. 29.4.1966 till his actual reinstatement in service of the appellant corporation with continuity of service. The respondent workman will also be entitled to all other consequential benefits including increments in the available time scale and revisions of the time scale, if any, and also further service benefits as per the rules and regulations of the appellant corporation being treated to have been in continuous service of the appellant corporation from 29.4.1966 all through out till reinstatement. The appellant corporation shall reinstate the respondent workman with continuity of service within 8 weeks from today and will also pay 50% back wages as directed hereinabove within that period. The appellant

Corporation will also grant all other consequential benefits to the respondent workman in the light of this judgment. Appeal stands allowed as aforesaid with no order as to costs in the facts and circumstances of the case."

In view of the aforesaid observations and also in view of the facts of this case, award of labour court is also just and proper even as regards back wages.

When workman raising an industrial dispute with specific plea of non compliance of sec. 25F of ID Act, 1947, burden is upon the establishment to prove that how it has complied with S.25F of ID Act, 1947 and as against such contention of workman about non compliance of S.25F of ID Act, if the establishment is coming with a plea that it is not obliged to comply with such provisions, then, burden would lie on the establishment to prove its all the contentions on the basis of which it is contending that such mandatory provisions are not applicable to it. Since that has not been done by petitioner, labour court was right in setting aside termination of workman and in granting 50 per cent back wages for intervening period with continuity of service.

After considering the contentions of learned AGP Ms. Raval for petitioner and Ms. Parikh for respondent workman, and considering the impugned award passed by labour court as well as reasoning given by labour court, according to my opinion, fact findings given by labour court for granting reinstatement with continuity of service and also for granting 50 per cent back wages for intervening period are sustainable and cannot be interfered in exercise of powers under Article 227 of Constitution of India as petitioner is not able to point out and establish that these findings are perverse or contrary to record or that the labour court has committed any irregularity in recording such findings of fact. This Court also cannot reappreciate such findings of fact for coming to a different conclusion. Decisions cited by Ms. Raval as aforesaid are not applicable in the facts of this case. Therefore, submissions as aforesaid made by Ms. Raval cannot be accepted and same are, therefore, rejected. Therefore, there is no substance in this petition and same is, therefore, dismissed. Rule is discharged.

(H.K. Rathod,J.)

Vyas